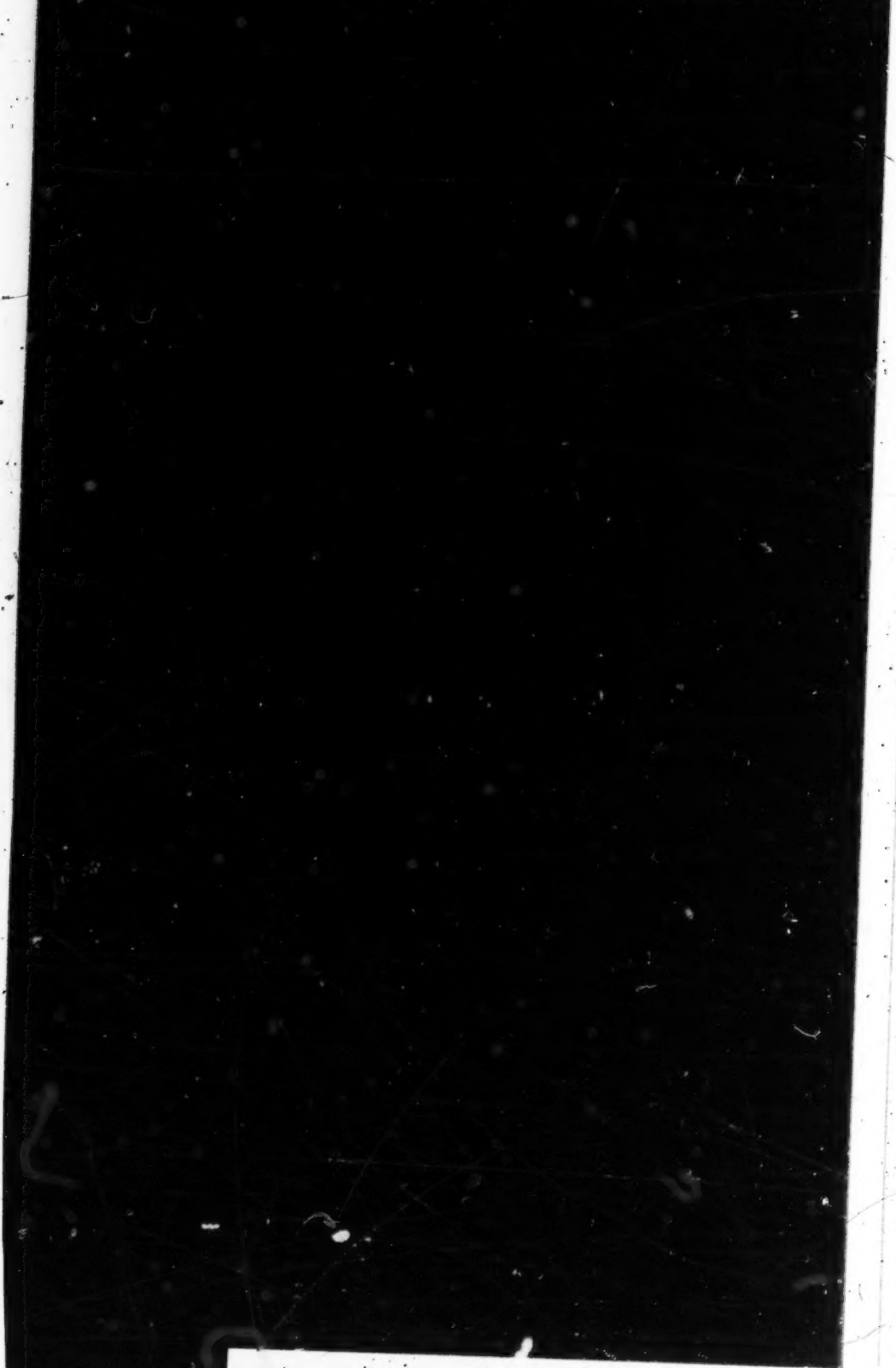

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 193

SAMUEL FELDMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority (R. 1666–1675) and dissenting (R. 1675–1677) opinions in the circuit court of appeals have not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered June 24, 1943 (R. 1678–1679). The petition for a writ of certiorari was filed July 23, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See

also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the admission in evidence against petitioner of his testimony in New York supplementary proceedings in which he was examined as a judgment debtor was a violation of his constitutional privilege against self-incrimination.

2. Whether reversible error resulted from—

a. The restriction of petitioner's cross-examination of the Government witnesses Goetz and Miller.

b. The admission of evidence of other offenses committed in connection with petitioner's transactions with Emanuel & Co. in 1930.

c. The submission to the jury of the Government's bill of particulars containing the names of numerous of petitioner's alleged victims as to whom there was no proof.

d. The trial court's charge to the jury and refusal of instructions asked by petitioner.

e. A comment, by Government counsel on summation, on petitioner's failure to call a certain witness.

STATUTES INVOLVED

Section 215 of the Criminal Code (18 U. S. C. 338) provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or

> for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter * * * in any post office * * * or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, * * * shall be fined not more than $1,000, or imprisoned not more than five years, or both.

Section 789 of the New York Civil Practice Act (L. 1935, c. 630), prior to March 14, 1938, provided:

> A debtor, party or witness examined in a special proceeding, authorized by this article, is not excused from answering a question on the ground that his examination will tend to convict him of the commission of a fraud; * * *. But an answer cannot be used as evidence against the person so answering in a criminal action or criminal proceeding, except on a charge or indictment for perjury committed in such examination.

Effective as of March 14, 1938 (L. 1938, c. 108, sec. 17), this statute was amended so as to provide also that "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concern-

ing which he may so testify or produce evidence, documentary or otherwise."

STATEMENT

On August 20, 1940, petitioner was indicted, in the District Court of the United States for the Southern District of New York, on nine counts charging him with having used the mails in execution of a scheme to defraud two classes of persons, in violation of Section 215 of the Criminal Code (18 U. S. C. 338) (R. 2–14). Seven counts were submitted to the jury (R. 1473–1476).[1] Petitioner was found guilty on all of them (R. 1509), and he was sentenced to five years' imprisonment on each, the sentences to run concurrently (R. 20, 1510-1511).[2] Upon appeal to the Circuit Court of Appeals for the Second Circuit, the conviction was affirmed (R. 1666–1675, 1678–1679), one judge dissenting (R. 1675–1677).

The scheme to defraud with which petitioner was charged consisted of "kiting" checks, described by Government witness Robinson as "a scheme whereby checks are drawn against insufficient funds and the delay in clearing [one] check is taken advantage of by cashing a[nother] check

[1] A verdict was directed for petitioner on counts 2 and 4, for the reason that they were based on the same mailings as counts 1 and 3 (R. 1475–1476, 474–475).

[2] On two counts, however, the sentence was suspended and petitioner was placed on five years' probation, to begin at the end of the service of his sentences on the other counts (R. 20, 1510–1511).

within two or three days, whatever the clearance factor is, and wiring the proceeds to cover the earlier check before arriving at the bank for payment" (R. 1166).[3] The two classes of petitioner's intended victims were (1) Those whom he would induce to cash checks for him, and (2) those whom he would induce to sign checks in blank and deliver to him (R. 3). While nine victims of the first class were named in the indictment (R. 3) and about 102 more in the Government's bill of particulars (R. 14y–14dd), the only mailings alleged with respect to this class of intended victims related to petitioner's transactions with the Essex House (R. 6–9), a New York apartment hotel. Edwin S. Reynolds was the only named victim of the second class (R. 3, 9–14, 14cc). Since the only mailings charged were in furtherance of the Essex House and Reynolds transactions, it was upon these transactions primarily that the Government's case rested. Transactions with other alleged victims were significant only insofar as they constituted a part of the same scheme to defraud, or provided evidence of the fraudulent intent with which petitioner's transactions with the Essex House and Reynolds were conducted.[4]

Between October 1935 and October 1936, although living in New York, petitioner maintained

[3] The meaning of the term "kite" in banking parlance is similarly described by Government witness Moore (R. 435–437).

[4] The trial court so instructed the jury (R. 1485–1486).

a bank account in his own name at the Emmett County State Bank in Harbor Springs, Michigan (R. 47–48; Gov. Ex. 85, R. 631, 1578–1579; Gov. Ex. 100, R. 1288, 1614). He frequently cashed checks for large amounts drawn on this account without having funds therein to meet them (R. 49–50). They were covered by the cashing of additional checks and wiring of the proceeds in the necessary amount to the bank (R. 52, 54, 57–58).[5] On August 10, 1936, when a $5,000 check arrived at the bank with only $147.67 in the account to cover it, the cashier by telephone asked petitioner to close out the account (R. 48–53). After the account was closed, checks written by petitioner continued awhile to come in and were protested for nonpayment (R. 52, 59–60).

Upon being asked to close out the account in the Emmett County Bank, petitioner, on August 26, 1936, personally opened an account in the name of his father, J. Feldman, of Petoskey, Michigan, in the First National Bank of Petoskey (hereinafter called the Petoskey Bank). When the cashier objected to opening the account for the reason that the bank had had prior experience with checks of J. Feldman drawn on insufficient funds and did not consider him a good credit risk,

[5] The Government witness Clarke, cashier of the Emmett County State Bank, testified: "The check would come through the mails in the morning and the check to pay it, the Western Union draft, would be deposited before three in the afternoon" (R. 57).

petitioner stated that he was well able to give his father financial assistance and would guarantee the account, which was thereupon opened with an initial deposit of $1,000 in currency (R. 61–62, 71, 74). On September 15, 1936, J. Feldman executed an authorization giving petitioner and Alfred B. Frank, who was J. Feldman's son-in-law and bookkeeper (R. 156–157), access to the account (Gov. Ex. 13, R. 65, 1527).[6]

From shortly after the opening of the Petoskey Bank account until August 21, 1937 (the period covered by petitioner's transactions with the Essex House), and thereafter from September 1938 until April 1939 (the period covered by his transactions with Stout & Co.), petitioner operated a check "kite" between New York City and the

[6] Although thus representing himself in August 1936 as a man of means, petitioner on March 31, 1936, in New York supplementary proceedings brought against him as a judgment debtor, had testified under oath that he was not then employed and never had been employed; that he had no business of his own and owned no stocks, bonds, or securities; that he lived on money supplied by members of his family; and that unpaid judgments against him totaled $150,000 (Gov. Ex. 85, R. 631, 1578–1580). In further proceedings of the same character he testified, on October 28, 1936, that he had been in the fur business, but since that business had been bad of late he had virtually given up all fur contacts; that he lived on money borrowed from friends and from his father, brothers, and sisters, who were "fairly wealthy"; and that there were 125 judgments outstanding against him totaling about $340,000 (Gov. Ex. 100, R. 1288, 1613–1615). By his own admissions, petitioner's judgment debts thus had increased by almost $200,000 between March and October 1936.

Petoskey Bank (R. 1165–1232, 1274–1278). His father would sign checks in blank in Petoskey and mail them to petitioner in New York, where petitioner would fill in the date, payee's name, and amount (R. 160; Gov. Ex. 102–B–C, R. 1287, 1621, 1623–1624). Between January 1 and August 21, 1937, petitioner cashed these checks in New York in the total amount of $910,842.25 (R. 1154). Of this amount $805,593.94 represented checks cashed by the Essex House (R. 498, 1170–1177). At no time did the balance in the Petoskey Bank account equal or exceed the amount of checks drawn and outstanding against it (R. 1177–1178). The drawing of each check was predicated upon petitioner's "being able to cash another check and wire the funds to cover the check drawn" (R. 1165). The successful operation of the "kite" was predicated in part upon the time factor of four or five days that it took for a check to clear between New York and Petoskey, passing through the Chicago Federal Reserve Bank (R. 72, 109, 121, 431–432, 467, 483–484, 1166–1167). When checks were about to arrive at the Petoskey Bank for payment petitioner would communicate by wire or telephone with Alfred Frank, or with the bank, in order to ascertain the amount needed to cover, and would then transmit by wire the proceeds of another check, or a part thereof, to Frank for deposit in the account (R. 78, 110–111, 169–171, 173, 176, 194–195, 203, 280–283, 298–299, 304–307, 377). The total amount transmitted by wire between

January 1 and August 21, 1937, was $860,930, as against $910,842.25 of checks cashed (R. 1159).

It was petitioner's practice to have employees of the Western Union branch office nearest the Essex House come to his apartment for the money (R. 297–300, 358–359, 361–364, 373–380). On a number of occasions petitioner wired funds under other names than his own, using most frequently the name of Joseph Little (R. 190–202, 300–302, 366, 380–381, 461–462), who was credit manager of the Essex House (R. 506, 508, 514, 521) while petitioner was a tenant there from September 10, 1936, until he was asked to leave in the latter part of August 1937 (R. 520, 529). In approving checks for petitioner, Little overstepped his authority and was discharged when the situation that developed was brought to the attention of the managing director (R. 523–524, 542) by the resident auditor (R. 493, 523) and by an officer of the National City Bank who, from an examination of the Essex House account, suspected that a check "kite" was in operation (R. 411–414). There is no evidence, however, that Little knew that petitioner was engaged in check "kiting," or that he authorized the use of his name by petitioner in the wiring of funds to Petuskey.

Although the Essex House transactions did not reach their peak until August 1937,[7] petitioner had

[7] During the first 21 days of August checks totaling $141,157.09 were cashed for petitioner by the Essex House (R. 1177).

admitted, in testimony sworn to in New York supplementary proceedings on July 21, 1937, that "I am taking advantage of my father's credit by 'kiting' his checks, to pay off obligations I have incurred, and also meeting the checks I have used of his. * * * I cashed his checks from time to time, and wire the money to him to make the checks good that I have already cashed until such time as I can borrow the money to make good the last one"; that he had been "kiting" for seven months; that he had torn up Western Union receipts for money wired, so as "not to have people know what I am doing"; and that he intended to file a petition in bankruptcy immediately (Gov. Ex. 102-B-C-D-E, R. 1287, 1621-1628). Although thus intending on July 21 to file a petition in bankruptcy "immediately," he proceeded in the first 21 days of August to draw on insufficient funds checks totaling $150,900 (R. 1177).

When on August 21, 1937, after investigation and discovery of the character and magnitude of petitioner's "kiting" activities, the Essex House ceased cashing checks for him, there were in transit to Petoskey for payment 9 checks cashed by it between August 16 and August 20, totaling $30,700 (R. 1180). The balance in the Petoskey Bank at the time was $.24 (R. 1178). Checks in this group were the subject matter of the mailings of August 20 and 21 alleged (R. 6-9) and proved (R. 468-

475) under counts 1–4 of the indictment.* The 9 checks totaling $30,700 were protested for nonpayment. (R. 480–483). Petitioner told the managing director and attorney for the Essex House that neither he nor his father had any money, but that if they would give him time he would make the checks good (R. 521–522, 592–593).

Thereafter petitioner telephoned Edwin S. Reynolds at Dayton, Ohio (R. 596–598), and at petitioner's request Reynolds signed in blank and mailed to petitioner a number of checks on his account in the Winters National Bank and Trust Co. of Dayton, telling petitioner that there was no money in the account and that he should not cash the checks without sending funds to cover them (R. 598–601, 663, 667–669). Petitioner, however, filled out four of them, two for $6,000 each and two for $10,000 each, and got William Erb, a broker employed by the New York Stock Exchange firm of Munds, Winslow & Potter, to cash them (R. 551–553, 569–577; Gov. Exs. 59–A–B–C, 60–A–B–C, 62, 63, R. 589, 573, 1552, 1554). With the proceeds, he took up the $30,700 of unpaid checks cashed by the Essex House (R. 1181–1187).

The Reynolds checks were protested for nonpayment (R. 553, 577–578). They were the subject matter of the mailings of August 23, 25, 26, 27, and 28 alleged (R. 9–14) and proved (R. 581–589)

*On earlier mailings the applicable three-year statute of limitations (18 U. S. C. 582) had run at the time the indictment was filed on August 20, 1940 (R. 1).

under counts 5–9. When the attorney for Reynolds' mother demanded payment, petitioner replied that "he didn't have any money; he was broke and down and out and couldn't get up the money" (R. 668, 672). Erb and Munds, Winslow & Potter, were reimbursed, for the $32,000 given petitioner on the Reynolds checks, by Reynolds' mother, who received from petitioner two notes for $12,000 and $20,000, respectively (R. 673–680; Gov. Ex. 86, R. 680, 1580, Def. Ex. N, R. 1411, 1634). The first was subsequently returned by Reynolds to petitioner (R. 1410–1412); the second, although reduced to judgment, remains unpaid (R. 690–691, 695–696, 699–700).

Petitioner's subsequent transactions with Stout & Co. between September 1938 and April 1939 (R. 715–984, 1193–1206, 1274–1278) were essentially similar to those with the Essex House. They resulted in a loss to Stout & Co. of $81,500 and the liquidation of that firm (R. 770–772).[9]

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[9] Although citing the dissenting judge's expression of doubt whether petitioner "had defrauded his friends or merely imposed upon their good nature and willingness to help him as he wished" (Pet. 3; R. 1675), petitioner does not challenge here the sufficiency of the evidence to support the verdict, but relies entirely upon errors alleged to have been committed at the trial. That the acts charged and proved constitute a violation of the mail fraud statute, see *Federman* v. *United States*, 36 F. (2d) 441 (C. C. A. 7), certiorari denied, 281 U. S. 729; *Lowe* v. *United States*, 115 F. (2d) 596 (C. C. A. 7), certiorari denied, 311 U. S. 717. We have summarized the evidence above in order that petitioner's contentions of prejudicial error may be appraised in the light of the clear and convincing proof of his guilt.

ARGUMENT

I

Petitioner did not take the stand at the trial, and he contends that the admission in evidence against him of his testimony given in New York supplementary proceedings on various occasions between March 31, 1936, and September 29, 1939 (R. 1578, 1580, 1589–1607, 1613–1628), was the equivalent of wringing it from his own lips within the meaning of the privilege against self-incrimination provided by the Fifth Amendment (Pet. 3–4, 13–23). As shown in the Statement (*supra*, pp. 9–10), petitioner, by his testimony given in the supplementary proceedings in July 1937, convicted himself out of his own mouth of having been engaged, for a period of seven months immediately prior to the first of the transactions charged in the indictment, in the same check "kiting" scheme of which the later transactions were in furtherance.

Petitioner's contention, and indeed the majority and dissenting opinions in the court below, proceed upon the premise that the testimony was given under the compulsion of a state immunity statute. We shall show (a) that the testimony was not in fact so given and hence the question sought to be raised is not presented, and (b) that, in any event, its admission in evidence was not the equivalent under the Fifth Amendment of

compelling petitioner to testify; and that therefore the decision of the court below was correct from every point of view.

a. Prior to March 14, 1938, Section 789 of the New York Civil Practice Act (*supra*, p. 3) did not purport to confer any immunity from prosecution, even in the courts of New York, for a crime disclosed in testimony given in supplementary proceedings, but merely provided that such testimony could not be used against the witness in a subsequent prosecution. New York has long followed *Counselman* v. *Hitchcock*, 142 U. S. 547, in holding that the constitutional privilege against self-incrimination is not avoided by a statute of this sort.[10] Petitioner therefore could have made a claim of privilege with the right to have it recognized, on the basis of incrimination under state law,[11] in the supplementary proceedings conducted prior to March 14, 1938.[12] But the

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[10] *People ex rel. Lewisohn* v. *O'Brien*, 176 N. Y. 253 (1903); *People ex rel. Taylor* v. *Forbes*, 143 N. Y. 219, 229 (1894); *People* v. *Buffalo Gravel Corp.*, 195 N. Y. S. 940, 948 (Extraordinary Trial Term, Erie County, 1922); see *Matter of Doyle*, 257 N. Y. 244, 251 (1931).

[11] The privilege against self-incrimination is provided by Art. 1, Sec. 6, of the New York Constitution. The testimony given by petitioner prior to March 14, 1938, was incriminating of fraud under state as much as under federal law. See New York Consolidated Laws (Cahill), c. 41, secs. 921, 925, 932, 938.

[12] Cases cited *supra*, note 10; cf. *Arndstein* v. *McCarthy*, 254 U. S. 71, 73, holding that Section 7 of the Bankruptcy Act (Act of July 1, 1898, c. 541, sec. 7, 30 Stat. 544, 548; 11

privilege against self-incrimination is waived by failure to claim it,[13] and petitioner, although represented by counsel in the New York proceedings (see R. 1597, 1625–1626), made no claim of privilege. His testimony given prior to March 14, 1938, which we have set forth in the Statement (*supra*, pp. 7, 9, 10) and which includes the only damaging admissions, must, therefore, in contemplation of law, be deemed to have been entirely voluntary.[14] All of the testimony given after March 14, 1938 (R. 1288, 1588–1607, 1616–1619), when a true immunity clause was added to the statute, was clearly but a repetition, during subsequent proceedings of the same character,[15] of portions of the earlier testimony which were not *per se* incriminating. Standing by itself, the

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U. S. C. 25), which is similar to the New York statute here involved as it stood prior to March 14, 1938, does not render inapplicable to a debtor's examination in bankruptcy the privilege against self-incrimination provided by the Fifth Amendment: *Ex parte Irvine*, 74 Fed. 954, 963–964 (C. C. S. D. Ohio).

[13] *United States* v. *Murdock*, 284 U. S. 141, 148; *Vajtauer* v. *Commissioner*, 273 U. S. 103, 113; *People* v. *Johnston*, 228 N. Y. 332, 340 (1920); *Great Western Turnpike Co.* v. *Loomis*, 32 N. Y. 127, 138 (1865); see, also, *United States* v. *Monia*, 317 U. S. 424, 427; *People* v. *Cassidy*, 213 N. Y. 388, 395 (1915).

[14] Cf. *Wilson* v. *United States*, 162 U. S. 613.

[15] The rule of most American courts is that testimony as to a particular transaction, given voluntarily when an incriminating question is first asked, waives the privilege completely as to all other inquiries pertinent to that transaction. 8 Wigmore, *Evidence* (3d ed. 1940), sec. 2276.

testimony given after March 14, 1938, would not have been privileged at all, as of the time it was given, in any state proceeding; and therefore the power to compel such testimony in the supplementary proceedings did not in any way depend upon the immunity clause of the statute.[16] Hence, petitioner would have derived no immunity, even in the courts of New York, by virtue alone of the testimony given after March 14, 1938.[17] Furthermore, even if such testimony were incriminating and therefore privileged, it was at most only cumulative of that given prior to that date, and, consequently, petitioner could not have been prejudiced by its admission in the trial below.

Since the testimony given prior to March 14, 1938, although portions of it were incriminating under state law, was not given pursuant to an immunity statute or made the subject of a claim of privilege, and that given after March 14, 1938, evoked no privilege for the immunity statute to avoid and, in any event, was merely cumulative, it follows that the New York statute, both before and after amendment, is without relevance to this case; that the situation is the same as though petitioner had testified at all times as an ordinary witness entitled to assert the privilege, where applicable; and that his testimony given in the New

[16] *Heike* v. *United States*, 227 U. S. 131, 143; accord, see *Matter of Doyle*, 257 N. Y. 244, 267 (1931); but cf. *Matter of Grae*, 282 N. Y. 428, 434 (1940).

[17] *Heike* v. *United States*, *supra*, note 16.

York supplementary proceedings was admissible against him at his trial below under the general rule "that if a defendant in a criminal case has testified in some other proceeding, such testimony may be used against him as an admission in a criminal case."[18] Under this rule, testimony by a criminal defendant previously given before a grand jury or coroner's inquest, or in state insolvency proceedings, has been held to be admissible against him at his trial.[19] In *Wilson* v. *United States*, 162 U. S. 613, this Court held in a capital case that the testimony of the defendant, given before a United States Commissioner at a preliminary hearing, was admissible against him at his trial, although he had not been represented by counsel at the time and had not been informed of his privilege against self-incrimination. In the light of this decision, coupled with the irrelevance of the New York statute, petitioner's contention (Pet. 8), as a reason for issuance of the writ of

[18] *Czarlinsky* v. *United States*, 54 F. (2d) 889, 893 (C. C. A. 10), certiorari denied, 285 U. S. 549.

[19] *Commonwealth* v. *MacKenzie*, 211 Mass. 578, 580 (1912). *People* v. *Wieger*, 100 Cal. 352, 358 (1893); *Hendrickson* v. *People*, 10 N. Y. 13, 27–28 (1854); *Abbott* v. *State*, 75 N. Y. 602 (1878); *State* v. *Robinson*, 32 Ore. 43, 51 (1897); *Williams* v. *Commonwealth*, 29 Pa. 102, 105 (1857); *Milton* v. *United States*, 110 F. (2d) 556, 559–560 (App. D. C.); *Boitano* v. *United States*, 7 F. (2d) 324, 325 (C. C. A. 9); *United States* v. *Mary Helen Coal Corp.*, 24 F. Supp. 50, 51 (E. D. Ky.): "The Fifth Amendment affords no immunity to a witness against the use of his voluntary testimony against him."

certiorari, that the problem here is a doubtful one which "far transcends the use of compulsory testimony obtained in supplementary proceedings" and which has not been but should be settled by this Court, is without merit. To contend that *Wilson* v. *United States* is not controlling of the issue here would be to assert that prior incriminating testimony given without objection comes under the Fifth Amendment at a subsequent trial by virtue of the fact alone that the privilege waived in the prior proceeding derived not from the Fifth Amendment but from a comparable state constitutional provision.[20]

Petitioner relies upon *Clark* v. *State*, 68 Fla. 433, 436 (1914), which holds without discussion that the introduction in a state criminal trial of testimony given by the defendant pursuant to Section 7 of the Bankruptcy Act (11 U. S. C. 25), in an involuntary bankruptcy proceeding, constitutes a violation of the state constitutional privilege against self-incrimination by "compelling, indirectly at least, the defendant in a criminal case to be a witness against himself." This decision, while concededly supporting petitioner's position, was obviously ill-considered. Section 7 of the Bankruptcy Act provides merely that the bank-

[20] The privilege against self-incrimination as provided by the Fifth Amendment, of course, has no application to the states. *Ensign* v. *Pennsylvania*, 227 U. S. 592, 597; *Twining* v. *New Jersey*, 211 U. S. 78, 93; cf. *Palko* v. *Connecticut*, 302 U. S. 319.

rupt's testimony shall not be "offered in evidence against him in any criminal proceeding"[21] and does not purport to provide any immunity. It therefore does not avoid the constitutional privilege, which can be claimed in bankruptcy proceedings despite the statute. *Arndstein* v. *McCarthy*, 254 U. S. 71, 73; cf. *Ex parte Irvine*, 74 Fed. 954, 963–964 (C. C. S. D. Ohio). Testimony given without claiming the privilege was thus legally voluntary. It follows that *Clark* v. *State*, if consistently applied, would establish a principle that treats the introduction of any admission, however voluntary, as "compelling, indirectly at least, the defendant in a criminal case to be a witness against himself." Such a principle, which would completely abrogate the application to criminal proceedings of a well-recognized exception to the hearsay rule, clearly is not the law; and the sweeping character of the court's decision on the facts before it weakens its authority in support of petitioner's position here.[22]

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[21] Presumably the prohibition applies only to federal criminal proceedings. Cf. *Ensign* v. *Pennsylvania*, 227 U. S. 592. In the exercise of the bankruptcy power Congress conceivably might validly prohibit the use of the testimony in state courts.

[22] Petitioner might also have cited *State* v. *Drew*, 110 Minn. 247, 251–253 (1910), which holds that the introduction, in a state criminal trial, of schedules of assets and liabilities filed by the defendant pursuant to Section 7 of the Bankruptcy Act, in an involuntary bankruptcy proceeding, constitutes a violation of his constitutional privilege against self-incrimination. The court relied upon two federal decisions which

Since petitioner was not in fact compelled by virtue of a state immunity statute to make incriminating admissions, the situation of one being trapped "between the interstices of the overlapping state and federal sovereignties," alluded to in the dissenting opinion (R. 1676), is not presented by this case; and no circumstances exist to justify departure from the general rule whereby admissions made in testimony given in other pro-

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held, however, merely that such schedules were protected from use in other federal proceedings by virtue of Section 860 of the Revised Statutes, repealed in 1910. (36 Stat. 352). *Johnson* v. *United States*, 163 Fed. 30 (C. C. A. 1); *Cohen* v. *United States*, 170 Fed. 715 (C. C. A. 4). *State* v. *Drew*, moreover, is directly *contra* to *Commonwealth* v. *Ensign*, 228 Pa. 400 (1910), affirmed in *Ensign* v. *Pennsylvania*, 227 U. S. 592, where this Court held (p. 599) that it is "only the testimony given upon the examination of the bankrupt under clause 9 [of Section 7] that is prohibited from being offered in evidence against him in a criminal proceeding" and not the schedules filed pursuant to clause 8. For holdings that such schedules as distinguished from the bankrupt's testimony are admissible in federal criminal proceedings, see *Slakoff* v. *United States*, 8 F. (2d) 9, 10 (C. C. A. 3); *Optner* v. *United States*, 13 F. (2d) 11, 12–13 (C. C. A. 6); *Czarlinsky* v. *United States*, 54 F. (2d) 889, 893–894 (C. C. A. 10), certiorari denied, 285 U. S. 549. Since Section 7 is not an immunity statute, as to either schedules or testimony, it follows that in a state criminal trial any testimony voluntarily given without a claim of privilege in the bankruptcy proceeding can have no greater sanctity than the schedules, unless by virtue of a possible application to state as well as federal proceedings of the provision of clause 9 prohibiting the subsequent use of the testimony. Such protection as is afforded to the testimony after it is given derives solely from the statute and not from any state or federal constitutional privilege.

ceedings are receivable in evidence against a criminal defendant.

b. Even assuming *arguendo* that the testimony given in New York supplementary proceedings subsequent to the amendment of the New York statute on March 14, 1938, was sufficiently incriminating to evoke the state constitutional privilege against self-incrimination and hence the state immunity provision, the decision of the circuit court of appeals, it is submitted, would still be correct. The privilege is one primarily against *testimonial* compulsion,[23] and here the only such compulsion occurred in the state proceedings. Since the privilege against self-incrimination provided by the Fifth Amendment does not apply to the states,[24] no federal right of petitioner's would have been violated by New York's compelling incriminating testimony. Furthermore, since the privilege applies only to answers incriminating under the laws of the jurisdiction exercising the compulsion,[25] New York could not have violated its own constitutional privilege against self-incrimination by virtue alone of the compelled disclosure by petitioner of a federal offense. The use of the incriminating testimony at the federal trial thus does not carry even the taint of unlawful state or private

[23] 8 Wigmore, *Evidence* (3d ed. 1940), p. 363.

[24] Cases cited note 20, *supra*, p. 18.

[25] *United States* v. *Murdock*, 284 U. S. 141, 149; *Dunham* v. *Ottinger*, 243 N. Y. 423, 438 (1926); *Gould* v. *Gould*, 201 App. Div. 674, 194 N. Y. S. 742 (1922); 8 Wigmore, *Evidence* (3d ed. 1940), sec. 2258, pp. 337–341.

action that has been held not to preclude the introduction at a federal trial of evidence secured by an unconstitutional search and seizure committed by state officers or secured by the trespass of private individuals.[26]

Nor does the mere fact that the testimony was compelled by state action render its admission at the trial below a violation of the federal privilege against self-incrimination. While this Court has held that the Fifth Amendment forbids compelling a witness to produce self-incriminating documents belonging to him and in his possession,[27] it has refused to extend the protection of the Amendment any further and has held that by it "A party is privileged from producing the evidence but not from its production."[28] Thus, the title to and possession of incriminating books and papers of a bankrupt may be transferred by operation of law to the trustee in bankruptcy, from whom in turn they may be procured by compulsion for use as evidence against the bankrupt without any violation of the latter's constitutional privilege.[29] The mak-

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[26] *Weeks* v. *United States*, 232 U. S. 383, 398; *Burdeau* v. *McDowell*, 256 U. S. 465; *Schroeder* v. *United States*, 7 F. (2d) 60 (C. C. A. 2); *United States* v. *One Ford Coup*, 3 F. (2d) 64 (W. D. La.); cf. *Olmstead* v. *United States*, 277 U. S. 438.

[27] *Boyd* v. *United States*, 116 U. S. 616, 618.

[28] *Johnson* v. *United States*, 228 U. S. 457, 458.

[29] *Ex parte Fuller*, 262 U. S. 91, 93–94; *Johnson* v. *United States*, 228 U. S. 457, 458; *Matter of Harris*, 221 U. S. 274, 279–280.

ing of an incriminating record or report may be validly compelled by a law previously in existence, and after being made it becomes public property to which no constitutional privilege attaches.[30]

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[30] *Ule* v. *State*, 208 Ind. 255 (1935); *State* v. *Cummins*, 76 Ia. 133, 136 (1888); *State* v. *Smith*, 74 Ia. 580, 584 (1888); *People* v. *Rosenheimer*, 209 N. Y. 115, 120 (1913); *State* v. *Donovan*, 10 N. D. 203 (1901); *United States* v. *Mulligan*, 268 Fed. 893 (N. D. N. Y.); *United States* v. *Dalton*, 286 Fed. 756, 757 (W. D. Wash.); see *Wilson* v. *United States*, 221 U. S. 361, 380–382; 8 Wigmore, *Evidence* (3d ed., 1940), sec. 2259, pp. 349–352: "The duty, or compulsion, is directed * * * to the generic class of acts, not to the criminal act, and is anterior to and independent of the crime; the crime being due to the party's own election, made subsequent to the origin of the duty. * * * The generalization, therefore, may be made, that *there is no compulsory self-incrimination in a rule of law which merely requires beforehand a future report on a class of future acts among which a particular one may or may not in future be criminal at the choice of the party reporting.* Such records therefore are not protected by the present privilege against self-incrimination. * * * The foregoing logic leads to the same result where the report required by law to be made is *oral* only; *e. g.*, those laws which require a person whose *vehicle*, machinery, or other property has *caused an injury, to make an oral disclosure* to an official, at the *time*, of his name and address or of other circumstances of the injury. The *logic* is the same; for here also the purpose is administrative, the duty applies to a generic class of acts, irrespective of the criminality of any particular one (and it is certain that only an occasional one will involve criminality); and the duty exists anterior to the whole series of acts, so that the possible criminality is due to the party's own election, and the duty is independent of it. That the report may in a given case be later used in a criminal proceeding, and that such a possible use was foreseen by the legislator, does not alter the fact that the duty existed prior to and independent of the criminality." [Italics the author's.]

The present case, if the testimony had been in fact compelled, would be governed by the same principles. Petitioner's statutory duty in New York of supplying information in aid of his judgment creditors was anterior to and independent of the criminal conduct of which he now stands convicted; it related to a generic class of acts and not to criminal conduct as such; the disclosure of crime was only incidental; his testimony was in effect an oral report which became the property of the state of New York; and he has no constitutional privilege against the production of the document, not belonging to him or in his possession, which contains such testimony. A contrary result in the present case would cast doubt on the admissibility against criminal defendants of various classes of legally required reports, such as income-tax returns, which, like the recorded evidence here involved, are of exceptional trustworthiness and are not the product of federal testimonial compulsion.

We therefore submit that, even though viewed as presenting the specific question (hitherto undecided) of the admissibility at a federal criminal trial of incriminating testimony secured from the defendant under the compulsion of a state immunity statute, the decision of the court below is entirely consistent with controlling principles and analogies.

II

As clear as petitioner's guilt was on the basis of the entire record, the other matters complained of could not have been prejudicial even if error was committed. They therefore do not require extensive consideration.

a. The Stout & Co. transactions, as set forth on the direct examination of the Government witnesses Goetz (R. 761–775, 832–839, 884–887, 1030–1032) and Miller (R. 840–855, 907–912, 980–982), were not, as petitioner contends (Pet. 14), "vital parts of the Government's case." This is clear from the fact that no mailing in furtherance of any of these transactions was the basis of any count of the indictment (see R. 2–14), and the jury was accordingly instructed that a conviction could not be based upon them (R. 1485–1486). Even so, petitioner was allowed wide latitude in his cross-examination of these witnesses (R. 776–832, 856–883, 887–896, 902–907, 913–980, 983–984, 1032), which covers three times as many pages of the record as their direct examination (170 pages as compared with 55). Petitioner complains that the trial court erred in precluding him from showing on cross-examination of Goetz and Miller that, as the partners of Stout & Co., they had carried insurance against losses resulting from fraud, yet had failed to file a claim for the $81,500 loss resulting from their transactions with petitioner

which had caused their liquidation, and that they had, in fact, withdrawn a claim for a portion of the amount, under circumstances indicating an opinion on their part at the time that they had no valid claim of fraud (Pet. 4–5, 14, 23–24; R. 891–902, 972–979, 1012–1026). It is true, as petitioner points out (Pet. 23–24), that a prior expression by a witness of an opinion inconsistent with his testimony at a trial is admissible for impeachment purposes. But there was nothing in the testimony of Goetz or Miller which the excluded evidence of a prior expression, by words or acts, of an opinion that they had not been *civilly* defrauded would have materially contradicted. For the mail fraud statute "is not limited to what would give rise to a civil action." *United States* v. *Groves*, 122 F. (2d) 87, 90 (C. C. A. 2), certiorari denied, 314 U. S. 670. "It was unnecessary to show that anyone had been actually defrauded, still less, that complaint had been made." *Schauble* v. *United States*, 40 F. (2d) 363, 367 (C. C. A. 8). In *Chambers* v. *United States*, 237 Fed. 513, 523 (C. C. A. 8), a requested instruction "that in order to find that the defendants devised a scheme to defraud in the sale of this land the jury must find that the statements which were made amounted actually to a substantial deception of those to whom the lands were attempted to be sold" was held to have been properly refused for

the reason that "it is not the law."[31] So here, if Goetz and Miller had no civil claim, it was for reasons that are without relevance to petitioner's criminal guilt. It would have been confusing to the jury to have introduced an irrelevant—but to the lay mind difficult to distinguish—issue of civil liability. As it was, the jury was made fully aware on the cross-examination of Goetz that a civil suit had been brought against petitioner on account of the Stout & Co. transactions but had not been prosecuted to judgment (R. 777–782). We therefore submit that the trial court's discretion in controlling the scope of cross-examination was not abused; that petitioner was not prejudiced; and that in fact the circuit court of appeals improvidently conceded error in this connection (R. 1674), since the rule as to impeachment

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[31] See, also, *United States* v. *Comyns*, 248 U. S. 349, 353; *Durland* v. *United States*, 161 U. S. 306, 313; *United States* v. *Rowe*, 56 F. (2d) 747, 749 (C. C. A. 2), certiorari denied, 286 U. S. 554; *Knickerbocker Merchandising Co.* v. *United States*, 13 F. (2d) 544, 545 (C. C. A. 2), certiorari denied, 273 U. S. 729; *Norman* v. *United States*, 100 F. (2d) 905, 907 (C. C. A. 6), certiorari denied, 306 U. S. 660; *Linn* v. *United States*, 234 Fed. 543, 545 (C. C. A. 7); *Baker* v. *United States*, 115 F. (2d) 533, 538 (C. C. A. 8); *Wine* v. *United States*, 260 Fed. 911, 914 (C. C. A. 8), certiorari denied, 253 U. S. 484; *Rimmerman* v. *United States*, 186 Fed. 307, 310 (C. C. A. 8), certiorari denied, 223 U. S. 721. *Norton* v. *United States*, 92 F. (2d) 753, 755 (C. C. A. 9), cited by petitioner (Pet. 36), does not support his position but holds merely that "There can be no intent to deceive where it is known to the party making the representations that no deception can result."

upon which it relied, while undisputed, is inapplicable here.

b. Contrary to petitioner's contention (Pet. 24–29), the testimony concerning his transactions with Emanuel & Co. in 1930 (R. 985–1010, 1033–1130) was properly admitted. The rule whereby evidence of other similar offenses is admissible as probative, where intent is in issue, "finds its most frequent application, in the field of federal criminal law, in cases of prosecutions for fraud in the use of the mails." *Simpkins* v. *United States*, 78 F. (2d) 594, 598 (C. C. A. 4). Its application is left to the sound discretion of the trial court. *United States* v. *Shurtleff*, 43 F. (2d) 944, 948 (C. C. A. 2). "No limit is placed upon the power of the court to admit evidence of a series of prior similar transactions committed by the accused in the ordinary course of his business." *Kettenbach* v. *United States*, 202 Fed. 377, 384 (C. C. A. 9), certiorari denied, 229 U. S. 613.[32] Here the

[32] In the *Kettenbach* case reports going back seven years were admitted. See, also, *Packer* v. *United States*, 106 Fed. 906, 909 (C. C. A. 2), (one-year time interval, but matter of time said to "rest practically in the discretion of the trial judge"); *Wolfson* v. *United States*, 101 Fed. 430, 433 (C. C. A. 5), certiorari denied, 180 U. S. 637 (over three years); *Walsh* v. *United States*, 174 Fed. 615 (C. C. A. 7), certiorari denied, 215 U. S. 609 (twelve years). The cases relied on by petitioner (Pet. 25–26) rest on lack of similarity rather than on the time interval involved. *Wolf* v. *United States*, 290 Fed. 738, 745 (C. C. A. 2); *Simpkins* v. *United States*, 78 F. (2d) 594, 598 (C. C. A. 4); *Jianole* v. *United States*, 299 Fed. 496, 499 (C. C. A. 8).

Emanuel & Co. transactions occurred in the regular course of the only business that by his own admission petitioner ever had. They involved the element, in common with those charged, of drawing in increasing amounts on an out-of-town concern against funds known to be insufficient and of wiring the money required for coverage, until the chain ended and petitioner was unable to make good a draft for $50,000, resulting in the loss of this amount by Emanuel & Co. (R. 988–989, 996–997, 1003–1004, 1064–1080). As the circuit court of appeals held (R. 1673), the testimony was therefore admissible, in the trial court's discretion, on the issue of intent. In no event, however, was it "of sufficient weight to make reversible error." *United States* v. *Shurtleff*, 43 F. (2d) 944, 948 (C. C. A. 2).

c. Petitioner's contention (Pet. 6–7, 14, 29–31) that the submission to the jury of the Government's bill of particulars, containing the names of numerous of petitioner's alleged victims as to whom there was no proof, constitutes reversible error, is without merit. The trial court clearly instructed the jury that they should "ignore those names entirely just as if they did not appear" (R. 1506) and could convict petitioner only of the transactions in connection with which letters were mailed as charged in the indictment (R. 1485–1486). Petitioner's contention, if tenable,

would apply equally to the giving to the jury (R. 1473) of the indictment, which likewise contained the names of alleged victims (R. 3) as to whom there was no proof.

d. In its original charge the trial court defined the crime in the statutory language, including the phrase "or for obtaining money or property by means of false or fraudulent pretenses, representations or promises" (R. 1472, 1473, 1477–1479, 1483, 1484, 1487–1488). Petitioner contends that by so doing, and by refusing his requested instruction that the jury "cannot find this defendant guilty of a scheme to obtain money under false pretenses, that that crime is not charged in the indictment" (R. 1507), the court permitted his conviction of "a crime for which he was never indicted" (Pet. 7–8, 14, 31–33). But the indictment, although starting with an allegation merely of a "scheme and artifice to defraud" (R. 2), subsequently alleged, in a paragraph of the first count (R. 5–6) incorporated into the rest by reference (R. 7–13), the making of "false and fraudulent representations, pretenses and promises." In a subsequent corrective charge the trial court instructed the jury that it must find "that there was in the defendant's mind a scheme or artifice to defraud," but could consider testimony as to the making of false representations, pretenses, and promises in determining whether there was such a scheme to defraud (R. 1507). This was all pe-

titioner could properly have asked. In fact, no distinction can validly be drawn under the statute whereby a scheme or artifice "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" does not constitute a scheme to defraud. Evidence of the former in any event supports the latter. Petitioner's requested instruction would have improperly taken such evidence out of the case.

Petitioner's requested instructions to the effect that for there to be a scheme to defraud, the intended victim must be ignorant of the facts constituting the scheme and must not knowingly have taken part therein (Pet. 36; R. 1493, 1495), would, without considerable amplification, have been incorrect and misleading as applied to the facts of the case.[33] As the trial court pointed out to petitioner's counsel, in language aptly descriptive of

[33] *United States* v. *Groves*, 122 F. (2d) 87, 90 (C. C. A. 2), certiorari denied, 314 U. S. 670; *Schauble* v. *United States*, 40 F. (2d) 363, 367 (C. C. A. 8); *Chambers* v. *United States*, 237 Fed. 513, 523 (C. C. A. 8). See, also, *United States* v. *Comyns*, 248 U. S. 349, 353; *Durland* v. *United States*, 161 U. S. 306, 313; *United States* v. *Rowe*, 56 F. (2d) 747, 749 (C. C. A. 2), certiorari denied, 286 U. S. 554; *Knickerbocker Merchandising Co.* v. *United States*, 13 F. (2d) 544, 545 (C. C. A. 2), certiorari denied, 273 U. S. 729; *Norman* v. *United States*, 100 F. (2d) 905, 907 (C. C. A. 6), certiorari denied, 306 U. S. 660; *Linn* v. *United States*, 234 Fed. 543, 545 (C. C. A. 7); *Baker* v. *United States*, 115 F. (2d) 533, 538, (C. C. A. 8); *Wine* v. *United States*, 260 Fed. 911, 914 (C. C. A. 8), certiorari denied, 253 U. S. 484; *Rimmerman* v. *United States*, 186 Fed. 307, 310 (C. C. A. 8), certiorari denied, 223 U. S. 721.

petitioner's later transactions with Stout & Co., "even if the person sought to be defrauded later learned of such scheme and actually took some part in its execution in the hope of not losing through the scheme, that that would not relieve the defendant" (R. 1494). Refusal to give the requested instructions was, therefore, clearly proper.

e. The Government witness Betty King Reynolds, former wife of Edwin S. Reynolds, testified that petitioner offered to pay her $15,000 not to testify against him and threatened her life and comfort if she should (R. 603). Petitioner brought out on her cross-examination that she had not informed the Government of this occurrence until about a year afterward—shortly before the trial—but that she had talked to her lawyer in Florida about it (R. 660–663). In his summation Government counsel commented on petitioner's failure to call the lawyer as a witness (R. 1469). Neither the specific comment nor its context is included in the record. There is, therefore, no adequate basis for appellate review. *Silkworth* v. *United States*, 10 F. (2d) 711, 712 (C. C. A. 2), certiorari denied, 271 U. S. 664. However, such a comment could not in the circumstances have constituted reversible error. The case is different from *Graves* v. *United States*, 150 U. S. 118, relied on by petitioner (Pet. 34), in two respects: (1) here the absent witness was not incompetent but only privileged, and the priv-

ilege could have been waived by the client, Mrs. Reynolds;[34] and (2) his absence could have raised no damaging inference on any issue of real significance in the case.[35]

CONCLUSION

For the reasons stated, the case presents no question warranting review on certiorari. It is, therefore, respectfully submitted that the petition should be denied.

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[34] 8 Wigmore, *Evidence* (2d ed. 1940), sec. 2327.

[35] In *Graves* v. *United States*, on the other hand, the comment was on the absence of the defendant's wife, whose identification as the woman present at the scene of the crime would have aided in identifying the defendant as the murderer, and the comment raised the inference that this was the reason for her absence. Of the other cases cited by petitioner (Pet. 34), *Hamburg-American Steam Packet Co.* v. *United States*, 250 Fed. 747 (C. C. A. 2), held the comment not error, and *Rostello* v. *United States*, 36 F. (2d) 899 (C. C. A. 7), involved an *instruction* to the jury that a presumption against the defendant arose from this failure to call a particular witness.

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